

United States Department of the Interior  
Office of Hearings and Appeals  
Hearings Division  
Court International Building  
2550 University Avenue West, Suite 416N  
St. Paul, Minnesota 55114-1052

December 9, 1998

<u>In the case of:</u>	)	
	)	
RAPID CITY INDIAN HEALTH	)	
BOARD, INC.,	)	
	)	Application for an Award of
Appellant,	)	Attorney's Fees under the Equal
v.	)	Access to Justice Act
	)	
DIRECTOR, ABERDEEN AREA	)	
OFFICE, INDIAN HEALTH SERVICE,	)	Docket No.: IBIA 97- 100-A
	)	
Appellee.	)	
<u></u>	)	

**DECISION**

On October 17, 1997, this office received an Application for Attorney Fees and Expenses Under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450m-1(c), referencing the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504 (1982), and 43 C.F.R. Part 4, Subpart F, from the Appellant, Rapid City Indian Health Board, Inc. (RCIHB), in the amount of \$91,437.05 (now \$107,465.78, less \$3,604.84 on a partial settlement of travel costs). The Application relates to Appellant's involvement in a request for hearing, IBIA No. 97-100-A, challenging the refusal by the Appellee, Director, Aberdeen Area Office, Indian Health Service (IHS) to renew Contract No. 241-95-0010 under the Indian Self-Determination and Education Assistance Act (ISDEA). The matter was heard by Administrative Law Judge Vernon J. Rausch, who issued a Recommended Decision wholly favorable to the Appellant, which was not objected to and which became final on September 17, 1997.

Judge Rausch has since retired, and the Application has been transferred to the undersigned for a decision. The parties have consented to this transfer and have jointly requested a decision on the existing record without further proceedings.

Under the EAJA, as amended,

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1) (1994). The words "...shall award, to a prevailing party ... unless..." places the burden of proof as to its asserted position on the non-prevailing side, here IHS. The substance of that burden, "was substantially justified," is stated by both parties to be "a reasonable basis in both law and fact for its pre-litigation and litigation position" (*italics added*). For several key reasons, collectively, that burden has not been met in the underlying case by IHS:

(1) In the Recommended Decision, read as a whole, Judge Rausch found no merit whatsoever in IHS's asserted arguments.

(2) The Indian Self-Determination and Education Act is stated to be remedial legislation, intended to be construed liberally in favor of Indians, who are to be benefitted by the Act. In the instant case, IHS is the embodiment of the federal government, serving in a position of control of the federal programs and of the federal funding appropriated for Indian health needs; and RCIHB is positionally the alter ego of the three major Tribes who, by their Resolutions and through the vehicle of ISDEA, denominated RCIHB to provide health care services to their urban-dwelling members in Rapid City. IHS bears all the obligations imposed on the federal government under ISDEA, and RCIHB is to receive all the benefits and to channel the services to the ultimate beneficiaries which the Act is intended to deliver. With the serious beneficial obligation imposed by ISDEA on the government and its designated agent, "*reasonable basis*" becomes an onerous consideration and burden -- like it or not -- for a governmental agency; and IHS's actions in failing to renew the ongoing contract for essential health services under "novel" legal theories (even with nine months' notice given) falls short of such a measure of "*reasonable*".

(3) In order to continue rendering medical services to its patients in the Rapid City Indian community, RCIHB required an ISDEA contract, and therefore had no alternative choice but to reactively engage in this litigation and to retain attorneys with the experience and expertise necessary to present its prevailing arguments against Appellee's novel legal theories. The rate of fees is thus justified, and the quantum of effort expended was necessary.

Upon consideration of the administrative record in the underlying action and of the briefs, affidavits and documents in the present Application, there is a satisfactory showing of entitlement by Applicant to an award of attorneys fees and expenses. I hereby grant Appellant RCM's

Application for Attorneys Fees and Expenses in the amount of \$103,860.94, which is a reasonable amount.

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William S. Herbert  
Administrative Law Judge